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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215449
Party	Defendant Nuclear Wine Company LLC
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Submission	Answer
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Date	04/28/2014
Attachments	REPLY-Notice of Opposition-Lumen Water v Nuclear Wine _2_.pdf(40318 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Lumen Water, Inc.,	§	
Opposer,	§	
	§	Mark: LUMEN
v.	§	Application Serial No. 85/971,019
	§	Published: November 19, 2013
Nuclear Wine Company LLC,	§	
Applicant.	§	

Commissioner for Trademarks
P.O. Box 1451
Alexandra, Virginia 22313-1451

ANSWER TO NOTICE OF OPPOSITION

Applicant Nuclear Wine Company LLC hereby Answers and responds to the Notice of Opposition (“Notice”) of Opposer Lumen Water, Inc. as follows:

In response to the unnumbered introductory paragraph of the Notice, Applicant denies that Opposer will be damaged by the registration of Application Serial No. 85/971,019 (the “Application”). Applicant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this unnumbered paragraph and, on that basis, denies them.

1. Nuclear Wine Company LLC is a California limited liability company, having a principal place of business at 1727 Prospect Avenue, Santa Barbara, California 93103.

Applicant otherwise denies any other allegations in Paragraph 1 of the Notice.

2. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2 of the Notice and, on that basis, denies them.

3. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3 of the Notice and, on that basis, denies them.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of the Notice and, on that basis, denies them.

5. The allegations in Paragraph 5 of the Notice constitute conclusions or law or legal argument to which no responsive pleading is necessary and, on that basis, Applicant denies them.

6. Denied.

7. Denied.

8. Denied.

9. Denied. In prosecuting the trademark application that led to U.S. Registration Number 3,953,059 for LUMEN in connection with “drinking water” in International Class 32, the applicant for that registration distinguished and persuaded the Examining Attorney at the U.S. Patent and Trademark Office to allow the application for the ‘059 Registration over U.S. Registration Number 2,847,190 for LUMENE in connection with “mineral and aerated waters” in Class 32 on the basis that Lumen Water sells its drinking water “exclusively to couture establishments.” Applicant Nuclear Wine Company, in contrast, is a small producer of artisan wines in Class 33 that it crafts and sells in California, primarily through direct sales through its wine club to relatively sophisticated and knowledgeable wine drinkers. The goods of Applicant and Opposer will never be sold in the same establishments.

10. Denied.

11. Applicant admits that it filed the Application as indicated in the records of the U.S. Patent and Trademark Office, and that the Application was examined without any objection and subsequently published in the Official Gazette of the U.S. Patent and Trademark Office on

the date indicated. Applicant otherwise denies any other allegations in Paragraph 11 of the Notice.

12. Denied.

13. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13 of the Notice and, on that basis, denies them.

14. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14 of the Notice and, on that basis, denies them.

15. Denied.

16. Denied.

AFFIRMATIVE DEFENSES

By way of further Answer, and without admitting any allegations in the Notice not otherwise admitted, Applicant Nuclear Wine Company avers and asserts the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE Opposer's Alleged Mark Coexists with Identical Marks

1. Opposer's alleged mark coexists with third party federally registered marks consisting of or containing the same LUMEN term for a range of goods and services, including water, rendering Opposer's alleged mark weak and barring any likelihood of confusion here.

SECOND AFFIRMATIVE DEFENSE Opposer's Alleged Mark Lacks Consumer Recognition

2. On information and belief, Opposer's alleged mark is not well known and has little if any consumer recognition, alone preventing any likelihood of consumer confusion,

particularly where, as here, Applicant's mark is used for materially different goods, sold to sophisticated consumers in different classes through materially different channels of trade.

THIRD AFFIRMATIVE DEFENSE
The Marks at Issue Have Coexisted Without Confusion

3. Despite the alleged use of both marks in commerce, there are no – and Opposer is unable to identify any – instances of actual consumer confusion, further evidencing the lack of likely consumer confusion.

ADDITIONAL DEFENSES

Without prejudice to the denials set forth in the foregoing Answer to the Notice of Opposition and Affirmative Defenses, and without admitting any allegations in the Notice not otherwise admitted, Applicant avers and assets the following additional defenses:

1. Opposer's claims are barred because Opposer fails to state a claim upon which relief can be granted.
2. There is no likelihood of confusion between Applicant's mark and the asserted mark.
3. Applicant will rely on any and all other valid defenses that may be developed through discovery and/or the testimony periods in this proceeding, including that Opposer has made statements to the USPTO that it knew were not true at the time that it made them.

WHEREFORE, having fully Answered the claims in the Notice, Applicant respectfully requests that the Notice be dismissed with prejudiced.

Dated: _____, 2014

Respectfully submitted,

By: /s/ Andrew J. Gray IV
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Opposition has been served via First Class Mail, postage prepaid, to Applicant at the address below on this the 28th day of April 2014:

Dyan M. House, Esq.
CARTER SCHOLER ARNETT
HAMADA & MOCKLER, PLLC
8150 N. Central Expy., Suite 1950
Dallas, Texas 75206

By: /s/ Andrew J. Gray IV
Andrew J. Gray IV